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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES OF AMERICA AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Equal Employment Advisory Council ("EEAC"), with the consent of all parties,[1] respectfully submits this brief *amicus curiae* in support of the petitions for a writ of certiorari in this case.

INTEREST OF THE *AMICUS CURIAE*

This case presents questions of great importance to employers throughout the United States, including EEAC's members, who are subject to the provisions of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e, *et seq.*) (Title VII) and Presidential Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978).) (E.O. 11246).[2] At issue is whether these regulatory schemes permit an employer and union to enter into a racially-based affirmative action program designed to remedy proportionate underrepresentation of minority employees in certain segments of the employer's workforce when there has been no judicial determination of past employment discrimination by the particular employer.

Most of EEAC's member representatives are charged with corporate responsibility for voluntary compliance with the federal civil rights laws.[3] As

[1] Their consents have been filed with the Clerk of the Court.

[2] There are approximately 325,000 employer contractors subject to the requirements of E.O. 11246. They employ about 30 million persons. *See Major Federal Equal Employment Opportunity Programs for the Private Sector Should be Consolidated,* A Report by the Comptroller General of the United States (HRD-78-72), June 9, 1978, p. 3.

[3] EEAC is a nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment issues. See, e.g., *The Regents of the University of California* v. *Allan Bakke,* 98 Sup. Ct. 2733, 48 U.S.L.W. 4896 (1978); *County of Los Angeles* v. *Davis* (No. 77-1553), *petition for cert. granted; Furnco Construction Corporation* v. *Waters,* 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977); *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977); and *Gardner* v. *Westinghouse Broadcasting Company,* —— U.S. ——, 46 U.S. L.W. 4761 (1978).

equal employment officers of employers which, for the most part, are federal contractors, they must attempt to determine not only their federal nondiscrimination and affirmative action obligations, but also the potential liability which those requirements might create to nonminority employees and applicants who may assert that these affirmative action efforts are unfair and discriminatory.

The decision of the Fifth Circuit majority below, holding that the program adopted by Kaiser and the Steelworkers violated Title VII, illustrates and intensifies the dilemma created by these competing interests. It places employers in the ironic and unfair position of facing liability to nonminority or

male employees because of good faith attempts to comply with the requirements found in statutes, executive orders and other government directives intended to prevent discrimination against minorities and women. Acceptance of this case for review would enable this Court to provide urgently needed guidance with respect to the permissible limits of affirmative action.

STATEMENT OF THE CASE

In 1974, Kaiser and the United Steelworkers of America ("Steelworkers") attempted to cure a severe deficiency of minorities in Kaiser's craft workforce by entering into an agreement establishing a new craft training program at each of 15 plants.[4] Kaiser was under substantial pressure from its federal contract compliance agency to rectify this imbalance and to increase its utilization of minorities in craft positions in order to comply with E.O. 11246 (Pet. App. 2a-3a; Kaiser Cert. Pet. at 3).[5] The program was adopted at least in part out of concern for possible enforcement proceedings by the Office of Federal Contract Compliance (OFCC).

Under the program adopted, eligible employees were divided into minority and nonminority groups. Openings were to be filled on a one-to-one basis in order of seniority from within each group. If selection for these openings had been based solely on seniority, and if race had not been taken into account, no minority employees would have been eligible to be admitted. Brian Weber—a white employee who had more seniority than some blacks selected—filed a Title VII suit alleging that he had been discriminated against on the basis of his race because he had not been selected for the program.

The Fifth Circuit majority found the craft admission program violated Title VII, and ruled that "[t]here can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the [particular employer's] employment scheme." (Pet. App. 9a). The majority opinion also rejected assertions that the training program was permissible on the basis that it was designed to correct past "societal" discrimination. (Pet. App. 16a). It reasoned that in the absence of prior discrimination by the particular employer, a racial quota loses its character as an equitable remedy and "must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)." (Pet. App. 15a).

The majority opinion also rejected assertions that the implementing ratio contained in the craft program could be supported independently by reliance upon E.O. 11246. It concluded, broadly, that attempts of the OFCC to distinguish a numerical goal from a quota have "proved illusory, and most such goals suggested by the OFCC can fairly be characterized as quotas." (Pet. App. 10a). The majority then held that "[i]f E.O. 11246 mandates the training program at issue here, *in the absence of any prior hiring or promotion discrimination*, the executive order must

[4] The same provision is contained in Steelworkers' agreements with other aluminum companies and also in the steel industry consent decree. See *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

[5] "Pet. App." references are to the appendix to Kaiser's petition.

fall before this direct congressional prohibition [in Title VII]." (Pet. App. 21a, emphasis in original).

In dissent, Judge Wisdom stated that the standard established by the majority was too strict. He would have ruled that:

> If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld. A zone of reasonableness, within which the employer and the union would be sheltered from liability would encourage private settlements. (Pet. App. 28a-29a).

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE RECURRING DILEMMA POSED BY CONFLICTING INTERPRETATIONS OF THE PERMISSIBLE EXTENT OF EMPLOYER AFFIRMATIVE ACTION.

A. The Impact on Voluntary Compliance with Title VII

The majority and dissenting opinions of the court below have had an impact far beyond the particular parties to this lawsuit. The opinions have increased the uncertainty over whether affirmative action programs adopted to remedy underutilization of minorities in an employer's workforce are permissible under Title VII and E.O. 11246 in the absence of findings that an employer has engaged in acts of past discrimination against the specific identified individuals who are beneficiaries of the program. Until the questions raised by the opinions of the Fifth Circuit are addressed by this Court, the enforcement of both Title VII and the Order may be substantially disrupted.

Thus, aside from any conclusion as to the soundness of either the majority or dissenting opinions below, there can be little disagreement with dissenting Judge Wisdom's statement that (Pet. App. 26a-27a):

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L. Ed. 2d 280.[6]

Judge Wisdom also correctly noted that "[d]ifferent courts may apply the law in arguably proper distinct ways," and that determining the result a court would reach in any Title VII litigation is "no small prob-

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[6] Without disagreeing with Judge Wisdom that the majority decision exposes the employer and union to possible back pay liability, we submit that his reading of the *Albemarle Paper* decision may be too literal in view of this Court's later decision in *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347 (1978). There, retroactive relief was denied to known discriminatees in part because the respondent employer was confronted with a "dilemma" created by an unsettled state of the law. See *Id.* 46 U.S.L.W. at 4351-4353 and n. 38. Nevertheless, unless and until similar issues raised in the affirmative action context are resolved by this Court, back pay liability to "reverse discriminatees" will remain a possibility which responsible corporate EEO officials cannot lightly disregard.

lem" (Pet. App. 26a). Because of the potential for varying circuit court interpretations of the validity of affirmative action programs, voluntary compliance with Title VII, especially by way of nationwide collective bargaining, is rendered particularly difficult. (Pet. App. 26a).[7]

For example, employers attempting to "self-examine and to self-evaluate their employment practices [under Title VII] and to eliminate, so far as possible, the last vestiges of their discriminatory practices"[8] find it impossible, under present law, to determine the affirmative steps they may legally undertake to remedy imbalances which may exist between the number of minorities in their workforce and the surrounding relevant labor market area. The decision below requires them to establish findings that they have engaged in discriminatory practices and then limit preferential treatment to identifiable victims of their discrimination. In other contexts, however, other courts of appeals have suggested that preferential affirmative class relief is not necessarily limited to identifiable victims. See e.g., *Carter* v. *Gallagher*, 452 F.2d 315, 328-330 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 175-176 (3d Cir. 1977), *cert. denied*, 46 U.S. L.W. 3803 (1978); and *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted*, No. 77-1553, 46 U.S.L.W. 3780 (1978).[9]

[7] For a more complete treatment of the dilemma facing employers, see McGuiness, *Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination*, Equal Employment Advisory Council, 1977, pp. 1-9, 107-131.

[8] See *Int'l. Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364, 14 FEP Cases 1531 (1977).

Additionally, voluntary compliance with Title VII must be evaluated in light of the Fifth Circuit's holding that the underutilization of minorities in craft positions was not a legally sufficient reason to permit the racial preference. (Pet. App. 16a-17a). Kaiser argues that its craft admission plan was justified by the disproportionately small share of its workforce held by minorities and its knowledge that its requirement for prior experience for craft applicants had a "disparate impact" on blacks because of their former exclusion from craft unions. (Kaiser Cert. Pet. at 4-5). The Fifth Circuit, however, found that under the circumstances of this case, the remedial plan "could not be approved even if it had been judicially imposed." (Pet. App. 14a).[10]

This approach conflicts with that recently taken by the Second Circuit in *Prate* v. *Freedman*, 17 FEP Cases 1572, 1575-76, 17 EPD ¶ 8535 (2nd Cir. 1978). There the court approved a consent judgment establishing a plan for preferential hiring of minority

[9] The *Davis* case does not raise issues concerning voluntarily adopted affirmative action programs. Although it is unlikely that the issues posed in the instant case will be resolved in the Court's disposition of *Davis*, the Ninth Circuit's majority opinion appears to apply an interpretation of Title VII's remedial scope which contrasts with the opinion of the Fifth Circuit majority below.

[10] See also *Lewis* v. *Tobacco Workers*, —— F.2d ——, 17 FEP Cases 622, 627 (4th Cir. 1978) (". . . § 703(j) [of Title VII] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance.")

groups. Although there were no findings or admissions of past employer discrimination, the court stated that a decree "designed to remedy the disproportionate impact of prior employment practices amounted to an admission of unlawful discrimination." 17 FEP Cases at 1575-76. Indeed, in rejecting challenges to the decree by white police applicants, the court awarded attorneys fees to the party defending the hiring preference, and characterized the plaintiffs' suit as "unreasonable and vexatious."

Given these conflicting judicial interpretations of Title VII, Judge Wisdom may well be correct in concluding that employers and unions attempting to comply voluntarily with Title VII take the chance of being liable "unless they instituted exactly what a reviewing court felt should have been instituted." (Pet. App. 27a). Their alternatives, therefore, would be to "either bring declaratory judgment actions, or wait to be sued." (*Ibid*). Without guidance from this Court, however, such additional litigation not only would be burdensome, but unlikely to provide sufficient clarification for employers whose operations are not located solely within one judicial circuit.

B. The Impact on Enforcement of E.O. 11246

The Fifth Circuit majority opinion also raises questions which may influence greatly the enforcement of E.O. 11246. That Order and supporting OFCCP affirmative action regulations require federal contractors to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments.[11] If a con-

[11] Revised Order No. 4, 41 C.F.R. Part 60-2.

tractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the underutilization in any particular job group. 41 C.F.R. §§ 60-2.10, 60-2.12. Government officials have stated repeatedly that the statistical imbalances that trigger these affirmative action requirements *need not be connected to any showing of past or present discrimination.*[12] Failure to comply with these regulations would subject the contractor to severe sanctions, such as cancellation or termination of all federal contracts (or any part thereof); withholding progress payments on a contract; or, debarment from future contracts. See 41 C.F.R. 60-1.26; 41 C.F.R. 60-2.2(b); and 41 C.F.R. 60-30.

Because these sanctions for non-compliance are so severe and the opportunities to challenge OFCCP and compliance agency policies so restricted, compliance with the agency's affirmative action requirements is generally the only practical course available to employers whose business is directly or indirectly dependent to any substantial degree on government contracts.

As noted previously, the majority opinion below concluded in broad fashion that the attempts of the OFCCP to distinguish between various types of numerical preferential hiring programs have "proved illusory." (Pet. App. 10a). As Kaiser's petition

[12] See *Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. 77*, 88 (1971); and Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y.U. L. Rev. 225, 229-230 (1971).

aptly points out, the treatment of the requirements of E.O. 11246 by the Fifth Circuit raises concerns that "any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII unless the employer or others are prepared to establish that the employer engaged in past discriminatory acts." (Kaiser Cert. Pet. at 6). The potential effect on the Executive Order program resulting from the majority decision below should be addressed and clarified by the Court at this time.

C. The Need For Clarification of Federal Policy

Responses to the decision below by the government agencies chiefly responsible for enforcing federal equal employment requirements reveal a compelling need for a consistent definition of federal policy on voluntary affirmative action.

Shortly after the Fifth Circuit's decision was issued, EEOC published for comment its Proposed Guidelines on Affirmative and/or Remedial Action ("Guidelines").[13] The preamble to the Guidelines indicates the Commission's awareness of the employer's dilemma and acknowledges the need to clarify the law governing voluntary affirmative action. Thus, the preamble states (42 Fed. Reg. at 64826):

> There is a need for the Commission to interpret the statute to apprise employers and other persons to take such remedial and/or affirmative action of the circumstances in which they may take such action and the parameters of the action they may take without subjecting themselves to liability based upon a claim that such remedial and/or affirmative action itself discriminated against an individual or group.

[13] 42 Fed. Reg. 68426, December 28, 1977.

In responding to this need, however, the guidelines purport to establish a legal standard which mirrors the dissent of Judge Wisdom in the instant case—a fact which, in itself raises an evident conflict with the prevailing position of the Fifth Circuit. In contrast to the finding of the majority below that preferential treatment must be premised upon a finding of discrimination by the particular employer, the Guidelines merely would require that:

> An Employer or other person subject to Title VII who has a *reasonable basis* for concluding that it might be held in violation of Title VII and who takes remedial and/or affirmative action reasonably calculated to avoid that result on the basis of such self-analysis does not thereby violate Title VII with respect to any employee or applicant for employment who is denied an employment opportunity as a result of such action. *The lawfulness of such remedial and/or affirmative action program is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer or other person subject to Title VII taking such action has violated Title VII.* (Emphasis added). [42 F.R. at 64826].[14]

[14] Under the Guidelines, the self-analysis required to determine whether there was a reasonable basis to conclude Title VII has been violated would not need to await related findings "by judicial, legislative, or administrative bodies with competence to act in this area." See *The Regents of the University of California* v. *Allan Bakke*, 98 S. Ct. 2733, 2757-2758, 2766 (1978) (Opinions of Justices Powell, and Brennan, *et al*).

It has been reported that the proposed Guidelines are being reevaluated by EEOC in light of the public comments which raised questions about the relevance of court decisions such as *Bakke* and the decision below. See Daily Labor Report No. 182, September 19, 1978, pp. A-7 to A-9, and E-1 to E-7. A draft of the revised guidelines, which reportedly has been circulated among federal government civil rights agencies, leaves the initially published Guidelines basically unchanged. The "Supplementary Information" accompanying the reported revised draft states that "[T]he Commission does not believe that where a person's affirmative and/or remedial action is challenged, that person must produce evidence sufficient to prove it has in fact discriminated. If it has proceeded pursuant to and in conformance with Executive Order 11246, evidence of its past discrimination may be irrelevant." (*Id.* at E-3). The revised draft also states that "in the Commission's view, the majority's holding [in *Weber* v. *Kaiser*] with respect to the relationship between Title VII and the Executive Order is clearly wrong." (*Id.* at E-4).

Because there is an evident conflict between the decision below and the Commission's proposed Guidelines on voluntary affirmative action, it would be highly desirable for all concerned to have the issue resolved by this Court to eliminate the dichotomy which may result from conflicting interpretations by the judiciary and the agency principally responsible for enforcement of Title VII.

Moreover, there is also an apparent discrepancy between EEOC's proposed Guidelines and the government's petition for certiorari in this case. As noted,

the Guidelines, as proposed, state that the lawfulness of an affirmative action plan is "not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer . . . has violated Title VII." (42 Fed. Reg. at 64826). The government's petition, however, asks this Court to remand the case to the district court for another hearing to determine whether there is any evidence, not now in the record, of discrimination by either of the party defendants (U.S. Cert. Pet. at 11, 15-17, 19-20). By clear implication, the government's request means that evidence beyond underutilization of minorities may be necessary to support a voluntary affirmative action program. And although the government's petition states that discrimination need not always be established in court to support voluntary affirmative action (Cert. Pet. at 11), the evidence it asserts would be required on remand (Cert. Pet. at 19) seems to establish a more demanding standard than that required by proposed Guidelines.

Finally, although perhaps unintended, the government's remand request contains its own impediment to voluntary affirmative action. On the one hand, it argues that Kaiser's utilization of minorities was so low that it created a "reasonable basis" for the voluntary affirmative action plan. (Cert. Pet. at 12). At the same time, it argues that a remand pursuant to *Bakke* is necessary to permit one of the parties or an intervenor—perhaps the government, itself an intervening party in this case—to prove prior discrimination against minorities. (Cert. Pet. at 19). If the Justice Department and EEOC pursue this policy in situations where federal courts restrict voluntary affirmative action, then the candid self

analysis contemplated by the proposed Guidelines would become a vehicle of self incrimination in a belated government discrimination suit.[15]

Because of the contradictions between the Fifth Circuit's decision here and the government's attempts to define the limits of voluntary affirmative action, employers and federal contractors have little recourse but to request that this Court step in and provide some clarification.

CONCLUSION

The issues raised in this case are of undeniable importance. Until they are addressed by the Court, employers will be left in the untenable position of having to choose between lawsuits—suits filed by state or federal agencies, minorities or women for failure to establish a result or goal-oriented affirmative action program, or suits filed by nonminorities or males for actions taken pursuant to such programs if they are adopted. Federal contractors and subcontractors face a similar problem. Approval of an affirmative action compliance program by OFCCP carries no guarantee of immunity from claims of reverse discrimination, yet failure to be awarded

[15] In urging that this case be remanded, the government also contends that it is not clear from the present record whether the action taken by Kaiser and the Steelworkers was consistent with the requirements of the Executive Order. (Cert. Pet. at 16-17). This assertion, however, is ambiguous for it may be construed to mean not only that the government thinks further evidence is required, but also, that the government itself is puzzled over the applicable legal standards. In either event, the government's position here clearly lacks the certainty it expressed in its proposed Guidelines.

such approval can lead to severe penalties, including debarment from future government contracts, cancellation of existing agreements, and the possibility of additional lawsuits. Until the present situation is resolved, employers will continue to face the real prospect of defending themselves in court regardless of the employment practices they adopt.

For the reasons stated above, we respectfully urge the Court to grant the petitions herein and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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